

23/1/2012

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Record No: 2011/1120R

**The High Court
Revenue**

Between/

Denis O'Brien

Appellant

-v-

John Quigley

(Inspector of Taxes)

Respondent

Case Stated

**Pursuant to Section 941 Taxes Consolidation Act, 1997 by R Kelly, Appeal
Commissioner for the Opinion of the High Court**

1. At an appeal heard before me on 7, 8 and 30 July 2003, the Appellant appealed against an assessment to capital gains tax in the sum of €57,848,753 for the tax year 2000/2001 (i.e. 6 April 2000 to 5 April 2001). The Appellant also appealed against an assessment to income tax and capital gains tax for the short tax year 2001 (i.e. 6 April 2001 to 31 December 2001). The assessment for the short tax year 2001 was withdrawn by Revenue during the hearing on 30 July 2003.
2. The matter was argued before me on the basis that the appellant was a resident for tax purposes of both Ireland and Portugal for the tax year 2000/2001 and, therefore, that his

residence for tax purposes fell to be governed by the provisions of the Ireland/Portugal Double Taxation Convention ("the Convention").

- 3.1 It was submitted by the appellant and accepted by Revenue that the appellant was tax resident in Ireland for all years up to the tax year 1999/2000 inclusive. When he submitted his tax return to the inspector of taxes for the tax year 2000/2001, the appellant stated that, in addition to being tax resident in Ireland for that tax year (by virtue of the 280 day rule in section 819(1)(b) Taxes Consolidation Act, 1997), he was also tax resident in Portugal for the same period, and that this residence status had been accepted by the Portuguese taxation authorities. The appellant's taxation status in Portugal was not contested by the inspector of taxes and the matter was presented to me on the basis that he was a resident of both Ireland and Portugal for the purposes of Article 4.1 of the Convention and that the tie-breaker provisions of Article 4.2 of the Convention then became relevant to determine which of the two states he should be deemed to be resident of for the purposes of the Convention for the tax year 2000/2001.
- 3.2 It was common case between the parties that, for the purposes of Article 4.2 of the Convention, the appellant did have a permanent home available to him in Portugal for the tax year 2000/2001. It was stated on behalf of the appellant that he did not have a permanent home available to him in Ireland for that tax year and therefore there was no need to examine the appellant's centre of vital interests. The inspector took the view that a property at 6 Raglan Road, Ballsbridge was a permanent home available to him for the tax year in question and it followed that, in the inspector's opinion, one had to examine the appellant's centre of vital interests which the inspector contended was in Ireland and therefore the appellant fell to be treated as a resident of Ireland for the purposes of the Convention. I decided that the immediate question to be determined was whether, for the purposes of Article 4.2 of the Convention, the appellant had a permanent home available to him in Ireland for that tax year.
4. In this regard, two preliminary issues arose for my determination. Firstly, the parties disputed as on which of them fell the onus of proving whether or not the appellant had a "permanent home available" in Ireland within the meaning of Article 4.2(a) of the Convention. I determined that such onus lay with the appellant.

Secondly, I was required to determine whether the two tests in Article 4.2(a) of the Convention, namely, the “permanent home available” test and the “centre of vital interests” test should be addressed together or sequentially.

- 5.1 It was submitted on behalf of the appellant that the tie-breaker tests in Article 4.2 of the Convention fell to be applied in sequence. The matter was before me on the basis that the first question arising under Article 4.2(a) was whether the appellant had a permanent home available to him in Ireland and the answer to that question was dispositive of the appeal issue. In other words, if it was determined that the appellant did not have a permanent home available to him in Ireland, he would be deemed to be a resident of Portugal for the purposes of the Convention as it was agreed between the parties that he did have a permanent home available to him in Portugal. In the event of such a finding, it would, therefore, not be necessary to consider in which of the two contracting states the appellant had his centre of vital interests for the purposes of the second tie-breaker test, which is also contained in Article 4.2(a) of the Convention.
- 5.2 It was contended on behalf of the inspector that it was normal practice, established internationally, to have one hearing as to how a Double Taxation Convention applied in particular circumstances dealing with all relevant issues in that hearing and that, therefore, the issues of “permanent home available” and “centre of vital interests” should be taken together in one hearing rather than having them addressed sequentially. The deciding body might then make up its mind based on all the evidence. It was desirable that this should be done in the current case in that one issue might inform another.
- 5.3 I determined this preliminary issue by holding that the question as to whether a permanent home was available to the appellant in Ireland should be addressed separately, that is to deal with the matter of “permanent home available” in the first instance and to issue a determination in relation to that. I determined that if there was a need to deal with the “centre of vital interests” issue we would proceed on the issue immediately thereafter. I said that I would hear submissions of the parties if there were issues from the “permanent home available to him” determination which would impact on the “centre of vital interests” issue. There were no such further submissions.

6. Accordingly, the net question for determination was the application, in the appellant's circumstances, of the provisions of Article 4.2 of the Convention for the purpose of determining whether, for the tax year 2000/2001, he should be deemed to be a resident of Ireland or a resident of Portugal for the purposes of the Convention, with the immediate question to be determined being whether he had a permanent home available to him in Ireland for that tax year.
7. The following persons gave evidence before me:
- 7.1 For the Appellant:-
Mr. Adrian Burke, Quantity Surveyor; Mr. John Rooney, Civil Construction Engineer; Mr. Joe Lawrence, Architect; Mr. John Meagher, Architect; Mr. Arthur Gibney, Conservation Architect; Mr. Cyril Craven, Electrical Engineer; Mr. John Bolger, Joinery Refurbisher; Mrs. Catherine O'Brien; Mr. Denis O'Brien.
- 7.2 For the Revenue:-
Mr. Peter White and Mrs. Laetitia White, previous owners of No. 6 Raglan Road, Dublin 4.
8. As a result of the evidence given by the aforesaid witnesses, the documentary evidence submitted, the written submissions made by the parties prior to the hearing, and the submissions made by counsel I found the following facts either proved or admitted:
- 8.1 **Income Tax and Capital Gains Tax Assessments**
During the tax year 1999/2000, the appellant disposed of 5,734,000 shares in Esat Telecom in exchange for loan notes in BT Hawthorn Limited valued at €285,927,994. A capital gains tax computation was not submitted with the 1999/2000 return of income as it was claimed that the provisions of section 586 Taxes Consolidation Act, 1997 applied to the disposal of shares and the acquisition of loan notes and therefore, no disposal of the original shares and no acquisition of new shares took place for capital gains tax purposes. In written submissions made to the Appeal Commissioners prior to the hearing of the appeal, Revenue stated that this had been accepted by the Inspector of Taxes.

8.2 In December 2000, the loan notes in BT Hawthorn Limited were disposed of by the appellant to Chase Bank plc for a net consideration of €284,830,824. This disposal gave rise to a potential capital gains tax liability of €56.86m for the tax year 2000/2001 in addition to liability on certain other capital gains arising on the disposal of other assets. On 8 October 2002, the inspector of taxes raised an assessment to capital gains tax on the appellant in the sum of €57,848,753 for the tax year 2000/2001. The inspector also raised an income tax assessment on the appellant on 14 October 2002 for the purposes of bringing into assessment foreign source income of €7,384,232 and a gain of €10,833,404 arising on the exercise of certain share options. The appellant submitted formal appeals against the assessments and subject to a prior agreement made between the parties that the part of the income tax assessment dealing with the matter of the gain of €10,833,404 arising on the exercise of certain share options would be listed separately for hearing by the Appeal Commissioners these are the appeals that have come to me for determination.

8.3 **77 Wellington Road, Ballsbridge, Dublin 4**

The appellant's private residence in Ireland was at 77 Wellington Road, Ballsbridge, Dublin 4, for a number of years prior to his marriage, and it became the family home of the appellant and his wife after their marriage. They ceased to reside at 77 Wellington Road in early February 2000 when they moved to Portugal. Under an agreement dated 28 January 2000, that premises was leased at arm's length to tenants for a period commencing mid-day on 1 April 2000 and ending mid-day on 8 April 2001. The letting was extended by Deed of Variation to 20 August 2001. The property was subsequently leased from 28 September 2001 to 27 September 2003 with an option to renew for a further two years. The inspector did not argue that 77 Wellington Road, Ballsbridge, Dublin 4 was available to the appellant.

8.4 **Residence in Portugal**

At the time that they vacated 77 Wellington Road, the appellant and his wife moved to live in Portugal. [He had built a home in Portugal in 1998 on a site that he had purchased in 1996. It is to this property that they moved in February 2000 and this is where the appellant and his family had their home during the relevant period.]

8.5 **6 Raglan Road, Ballsbridge, Dublin 4**

In the period from summer 1999 up to November 1999, the owners of the private residence at 6 Raglan Road, Ballsbridge, Dublin 4, Mr. and Mrs. White, received calls from three or four estate agents in Dublin all saying that they had a particular client who was very anxious to buy their private residence at that address. At that time, Mr and Mrs white had lived in the house for 15 years approximately and had not put the house up for sale and did not intend to sell their home. Eventually, a particular estate agent wrote to Mr White and asked that a

particular client of his be allowed to view their house. Mr and Mrs White agreed that the viewing could take place and the appellant visited the house. Shortly after the visit, the estate agent rang to say that the appellant was interested in buying their home. Terms were eventually agreed between Mr and Mrs White and the appellant.

8.6 It had been initially agreed between the parties that the Whites would take the O'Brien then family home at 77 Wellington Road, Ballsbridge, in part-exchange for 6 Raglan Road. However, this proposal did not go ahead and a straight sale was agreed in respect of 6 Raglan Road for a consideration of £7.1m.

8.7 Number 6 Raglan Road, the house I am concerned with, was acquired in the name of Parteney, a company controlled by the appellant, under a contract of 10 February 2000 which was closed on 10 May of that year.

8.8 The kitchen units, including the in-built Aga cooker, did not form part of the sale and, under agreement between the parties, these items had been removed from the house by the vendors prior to the closing date of the purchase.

8.9 Opening-up works at 6 Raglan Road commenced in June 2000. The house was subject to increasingly invasive opening-up works from June to September 2000 and remained in the opened-up stage from then until the contract work commenced in the following January 2001. Contract works were in progress throughout the calendar year 2001.

8.10 Mrs. O'Brien played a major role in the selection of fittings and furnishings for the Raglan Road house. Refurbishment works were carried out to the property to requirements set for the project architect by the Appellant and his wife. Mrs O'Brien had a high level of involvement with the refurbishment works, particularly in relation to the fitting out, furnishing and decorating of the property and the landscaping of the grounds. Mrs O'Brien was the only interior designer on the project.

8.11 Neither the Appellant nor Mrs. O'Brien or his family resided in 6 Raglan Road, Ballsbridge, Dublin 4 at any time prior to the end of the tax year under review.

8.12 The appellant's wife took a one-year lease of 6 Raglan Road commencing on 14 February 2002, and the appellant and his wife and children occupied the house during the course of their visits to Ireland. The house was vacated by them on 13 March 2003.

8.13 Prior to the commencement of the occupation of 6 Raglan Road by the appellant and his family, extensive building works, which had been commissioned by Partenay Limited, had been completed and the house had been decorated and fitted-out to exacting and high-quality specifications. The house had been fully furnished and an extensive garden-landscaping programme had been carried out. All of these works had been finished in the weeks immediately prior to the commencement of the occupation, subject to the completion of the snag list by the contractors, which was finalised post commencement of the occupation.

8.14 As regards the furnishing of the house, some of the furniture used was furniture that had come from the previous family home at 77 Wellington Road. This furniture, which was mostly antique-style Georgian furniture that had been collected by the appellant had been kept in storage subsequent to their vacating the previous family home at 77 Wellington Road in February 2000.

9. Evidence

9.1.1 The appellant gave evidence that he had an interest in buying properties for investment purposes and that he commenced such purchases in or about 1993 and 1994. He said that he was particularly interested in buying properties for investment purposes in the Dublin 2 and 4 areas. He said that he had experience in developing both residential and commercial properties. He had developed a block of offices in the Irish Financial Service Centre, offices in Donnybrook and an office building on Mespil Road. The appellant said that he had an interest in approximately ten residential properties in the past ten years. He said that this was about to grow again as he was interested in purchasing a number of properties in Portugal. The appellant gave evidence that if he is making a property investment he does so having considered the matter with his wife and that in relation to the property at 6 Raglan Road she took a close interest in its development as a project.

9.1.2 The property at 6 Raglan Road, Ballsbridge, was acquired on behalf of the appellant as an investment. At the time of purchase, both the appellant and his wife had it in mind that it could potentially at some stage in the future be used as a family home. The main reason the appellant advanced for purchasing the property was that it was bought as an investment and that it would make a good investment over ten years as he was assembling properties in the area. The appellant advanced as a second reason for buying the property the fact that if he and his wife decided to return to Ireland it could be a potential property they could move into. In addition, the appellant acknowledged, under cross-examination, that he and his wife could have, if they had so chosen, moved into the house at the time of purchase, but that the house would not have been suitable for his family.

9.1.3. Building works were carried out to the property to requirements set by the planning authorities, the project architects and engineers, building regulations and health and safety regulations. Refurbishment works were carried out to the property to requirements set for the project architect, the appellant and his wife.

9.1.4. The appellant's wife gave evidence that at the time when the appellant sold his company they were looking at interesting properties as they were in a position to invest money in property and that it is something that she enjoys doing. The appellant's wife gave evidence that she has been involved in purchasing property in both Ireland and Portugal. She gave evidence that she had built two properties on a site in Portugal and had sold them for a profit and that they had also had an interest in refurbishing a property on Wellington Road, Dublin to a very high standard. Evidence was also given in relation to the refurbishment of properties in London.

9.1.5 The appellant's wife acknowledged that, initially in 1999, she saw it as a possibility that the property would be the family home in the future although at that time she had not had her children. She gave evidence that it was a long term investment and that some day they could live in it but it was a chance for her to indulge in her passion for refurbishing property.

9.1.6 The appellant gave evidence that he now resides at 10 Rua Atlantico, Quinta de Lago, Almancil, Portugal. He said that he bought a house site in 1996 and that he constructed his

home. The appellant gave evidence that up until January 2000 he had been Chairman and Chief Executive Officer of a business which was floated on the Dublin Stock Exchange and that in January 2000 he gave up his executive responsibility. When he ceased to be an executive of the company he and his wife decided to move to Portugal. From that time he was living and working in Portugal, he had an office there and he was developing a business in Portugal. He moved into the home in Portugal in February 2000. He and his wife brought ~~all items of sentimental value to the home in Portugal in March 2000.~~ These items included family photographs and personal things. He brought books and business items and files to his home in Portugal.

- 9.1.7 The appellant's wife gave evidence that her home is in Portugal and that is where she lives. She gave evidence that her "stuff" was in Portugal and that is where her home is. Her daughter, Alva, and her son, Jack, go to school in Portugal. Her daughter, Alva, lives in Portugal and had never lived in Ireland. Her clothes, her CD collection, her DVD collection are in Portugal. She said that all the children's clothes and toys that they have grown out of are stored in Portugal as are the photographs, wedding presents and other things. The furniture that was put into the house in Portugal has at all times stayed there. She explained that when her friends write to her they write to her at her address in Portugal.

Condition of the Property at 6 Raglan Road

- 9.2. The appellant gave evidence that he did not contemplate living in the house at 6 Raglan Road in the condition in which he purchased it. He said that he was in the process of moving out of Ireland at the time when he purchased the property. The appellant gave evidence that he had no permanent home in Ireland in that period. He said that his family home is in Portugal and that he moved all personal possessions to that home. He said that Portugal is where his family lives, where his business is based and that if people were trying to contact him by telephone they would telephone his home in Portugal. The appellant gave evidence that if contacts had telephoned or knocked on the door of the house in Raglan Road they would not have reached him. He said he could not recollect having ever received any post for redirection from Raglan Road, nor did he ever receive any parcels or messages at that building during the relevant period. He said that he would never move into the house with a family in the condition that he had purchased it, he explained that if you went through the hall

door of the house there were bits of masonry falling down and that when you closed the doors masonry would fall on the ground. ~~He said that the property was not habitable for his family.~~

- 9.3 John Meagher, an architect in the firm of De Blacam & Meagher gave evidence that he was the partner in charge of this development. Mr. Meagher said to the appellant at the time of the purchase that the property purchased by the appellant would require major expenditure, both of time and money, if it was to be brought up to an acceptable state and if it is going to safeguard their investment. Mr. Meagher said that in his opinion the property was run down and was neglected. Mr. Meagher said that the property was damp, dark and dreary. He said that the heating was totally inadequate and the property needed to be totally rewired as in its current state it was unsafe. The property also required re-plumbing.
- 9.4 Evidence was also given that a room in the property had a sunken circular area cut out which in his view was not only ugly but completely dangerous and needed to be changed. Evidence was given that the property was unsuitable for habitation because of the ad hoc wiring and plumbing arrangements. Mr. Meagher said that it would not have been possible to live in the property while the rewiring and re-plumbing was going on. He gave evidence about the issue of loose slates and issues relating to the bracket from the soffit which were about to fall off the premises. He said that that the premises was dangerous.
- 9.5 John Gibney, an architect with a doctorate in Irish Historical Architecture said that he has expertise in the conservation of buildings. Mr. Gibney said that the property had had ad hoc repairs over a period but no comprehensive repairs. He said that the slates on the roof were mended if they gave trouble but in an ad hoc fashion. He said that there was a fair amount of damp in the basement and even more damp in the mews. The roof of the mews was in very bad condition he said that the gutters were not of high quality. He said that in relation to the windows there were bits of tape on them to stop drafts coming in and some of the frames looked as if they were coming apart. He said that the fascia boards, the boards underneath the roof, hadn't been painted in a long time. He said that the console brackets which supported the overhang of the roof were made of stone and a lot of them had been broken and parts had fallen off. He said that the sunken area was not dangerous. He agreed that the photographs of the house taken by Mr. White in 2000 showed pleasant decoration up to the standard that would be expected of a period house.

- 9.6 Cyril Craven, electrical engineer and senior engineer in McArdle McSweeney & Associates, Consultants gave evidence in relation to mechanical and electrical installations in the property. Mr. Craven said that the electrical installation in the property was not in conformity with current standards.
- 9.7 Mr. Joe Lawrence, an architect in the firm of De Blacam & Meagher, the architects involved in the project gave evidence that he was the project architect in respect of the development at 6 Raglan Road. He said that Mr. Meagher was the partner in charge of the project. Mr. Laurence said that the project architect deals with the day to day matters on a job and that the partner in charge oversees the project architects work and the work of the office. Mr. Laurence said that in September 2000 opening up works had been done on the property, floor boards were stripped from the ground floor and upper ground floor. Trial holes had been dug in the lower ground floor and that there were no fixtures or fittings or furniture in the house. He explained that there was no kitchen. Mr. Laurence said that the house hadn't been maintained properly. Mr. Laurence said that they got advice from mechanical engineers that the whole house needed to be re-wired and that the old fuse board wouldn't comply with today's building regulations. Mr. Laurence said that there wasn't a proper central heating system in the property. Mr. Laurence said that from September 2000 up until April or May 2002 the house could not have been lived in prior to or during the works. Mr. Laurence said that the premises became a hard hat site from the day the contractor went on site which was 8 or 9 January 2001.
- 9.8 Mr. John Rooney, a civil construction engineer and a partner in Fearon O' Neill Rooney, Consulting Engineers gave evidence that his firm was retained in connection with the project at 6 Raglan Road. Mr. Rooney gave evidence that there was serious rising damp in the basement of the building and that there were problems with decorative cornices in that one of the decorative cornices had broken and a piece of it had fallen and was lying on the ground. Mr. Rooney said that the decorative cornices were dangerous in circumstances where some of them had fallen. Mr. Rooney said that to establish the condition of the building and in order to plan for making alterations to the building the soil and existing foundations of the building had to be examined. He said that to do so holes had to be dug inside and outside the building. He said that the holes could be up to about 4 foot deep. Mr. Rooney said that in September 2000 when he visited the property the floorboards were lifted, plaster was off the walls and the kitchen was nonexistent and in those circumstances he wouldn't consider that the building was habitable. Mr. Rooney said that when the building contractors took possession of the premises the property could not be lived in.

- 9.9 Mr Adrian Burke, a Quantity Surveyor working with Pierce Contracting gave evidence that he was Contract Manager on the project at 6 Raglan Road. Mr Burke gave evidence that when he first went to the property the property was in a dilapidated condition and that the property was damp. Mr Burke gave evidence that there were dangerous areas around the property particularly on the outside where a number of concrete brackets had deteriorated over time and where part of masonry had fallen off.
- 9.10 Mr Burke said that when Pierce Contracting took over the site in January 2001 the property resembled a building site with site cabins and security employed. Health and Safety procedures were set up and access to the site was restricted to those directly involved in the refurbishment or restoration works in the property. Appointments would need to be set up if anyone was to visit the site including the agents of the owner company or anyone there under permission. Mr Burke gave evidence that the floors had been opened and that this was a dangerous situation. He said that Pierce Contracting refurbished the property which entails new heating systems, new wiring, alarm systems and the restoration of features in the property to include doors, windows, window shutters and floors to as near as they could to the original condition. In the basement area or ground floor area there was extensive damp which was corrected by hacking off all plaster in the basement area and re-plastering it with a special damp proof treatment plaster. Mr Burke said that there were extensive external works, soft and hard landscaping and renewal of all drainage and services. Mr Burke said that they built a large two-storey extension at the back of the property and that they refurbished a mews to the rear of the property. He said that while the renovations were being carried out the property was not fit for human habitation as it was a building site. Under cross-examination Mr Burke gave evidence that there were a number of particular requirements of the client such as for internal light switches and Mr Burke gave evidence that this would be very normal in a project of this nature. Mr Burke also said that they would take their instructions from the architect on all ranges of matters for the job. Mr. Burke said that it was normal that on a project of this scale that certain aspects of the job would be completed to client specification and client taste.
- 9.11 John Bolger of the firm T&W Bolger, Refurbishers & Joinery gave evidence that his firm was engaged in relation to the work on 6 Raglan Road. Mr. Bolger said that when surveying the windows of the property he found that they were in reasonably poor character. He said that there were 30 windows requiring about 120 repairs which amounted to 4 repairs per window.

Mr. Bolger said that the house had 60 windows in total and 38 of them needed to be completely replaced.

9.12 Mr. Peter White gave evidence as follows:

9.12.1 Ownership of 6 Raglan Road by the White Family

Mr and Mrs White bought 6 Raglan Road in 1985 at auction for £140,000.00. Apart from a period of 6 months or so in 1990, it was their family home from the date of acquisition up to 10 May 2000, the date on which Partenay Limited completed the purchase.

9.12.2 When they bought it, the house had been let in four separate flats and was in poor condition. They removed all the partitions and restored the house to its original proportions and for use as a single residence.

9.12.3 They secured the services of various contractors and, in the twelve months or so following the purchase, they spent somewhere between £250,000-£400,000 on various works including roof slating, electrical wiring, plumbing, window repairs, heating system and decoration and internal layout features.

9.12.4 Mr and Mrs White arranged to have a service kitchen installed at hall level next to the dining room. This was done on grounds of convenience to facilitate catering as, in their own words, the Whites did a reasonable amount of entertaining.

9.12.5 A mews to the rear of the house functioned separately to the house, and was occasionally let out to visiting celebrities in the entertainment industry.

9.12.6 Bathrooms were put in for each bedroom and a new kitchen was installed at the front of the house. The English company, Smallbone, came over and assembled the new kitchen on the

spot. That was done about 1990. He and his wife put in an Aga cooker. In addition, his wife had a gas cooker and/or electric hob in case any one cooker went wrong.

9.12.7 As regards the heating system, they put in a new gas-fired boiler and electric heating was installed throughout the house. Gas-fired central heating was supplemented by electric storage heaters and convector heaters where necessary. They spent a lot of money to replace the entire wiring system in the house. Modern circuit boards were put in and the storage heaters were separately wire.

9.12.8 Mr. White gave evidence that he and his wife installed a travertine marble floor and this involved taking out virtually the entire of the basement. They put in tiles in the kitchen, in the sun-room and in the shower area next to the bedroom in the basement. Before tiles were laid in that area a protective membrane was put in to prevent dampness. Mr. White was not aware of any dampness in the house. He was aware of dampness in the mews as a result of earth being banked up against their wall by a neighbour.

9.12.9 Mr. White stated that his wife was interested in interior décor; they always did renovation and he thought that the house looked reasonably well. He gave evidence that they had many famous visitors and nobody complained about the décor or the condition of the house. When they left the house in the spring of 2000, Mr. White believed that it was in exactly the condition that Mr. and Mrs. O'Brien had seen it in.

9.12.10 Mr. White stated that he and his wife were aware of problems with the windows. They brought in Ventrola around 1990, asked them to repair any windows which were draughty and he thought that they did a reasonably good job.

9.12.11 It was possible that some slates might have been missing but he was astonished at the previous evidence that masonry was falling from the house. As far as he was concerned, there was nothing wrong with the house.

9.12.12 Mr and Mrs White occupied the house on a full time basis up to the twelve month period or so prior to vacating the house in May 2000. During the last twelve months of their period of ownership the Whites spent roughly a third of their time at 6 Raglan Road as they had acquired a house in France and a house in England and spent irregular periods in each of the three houses but they estimated that overall their time was divided evenly between the three locations. However, 6 Raglan Road was occupied at all times by adult family or adult family friends during their periods of absence and their family pets remained in the house and needed to be looked after.

9.12.13 Mr and Mrs White produced a number of photographs of the interior of the house, which had been taken in the twelve months or so prior to their vacating the house. These photographs showed the house very shortly before the Whites moved out to be a fully-furnished family home. In their own words, they could have seen themselves being there for years to come. A copy set of said photographs is annexed to and forms part of this case stated (Appendix A).

9.13 Mrs. Letitia White gave evidence as follows:

9.13.1 When she and her husband bought the house in 1985 it was in a very shabby condition as regards décor and a major job needed to be done on the roof slates.

9.13.2 Some of the finials on the exterior of the house were in bad condition and they were restored. After the work was done, the finials never gave trouble and during the 15 years that they were in the house Mrs. White never experienced masonry falling away, never saw any plaster on the ground and never received a report from anybody that plaster from the finials was on the ground.

9.13.3 Mrs. White and her husband had a Smallbone kitchen installed in the original kitchen location in the house in the basement. An Aga cooker was installed in the kitchen and Mrs. White never experienced any difficulty with the operation of the kitchen. In addition, there were gas and electric cooking options separate from the Aga. Mrs. White believed that it was always

useful to have electric or gas as a back-up to an Aga. Mrs. White could envisage somebody moving into the house after them and simply walking into the kitchen as it was.

- 9.13.4 Mrs. White gave evidence that there was also a service kitchen near the dining room and this was used when they were catering for guests.
- 9.13.5 Mrs. White gave evidence that central heating for the house was provided by means of two gas boilers. In addition, there was storage heating in the house and there were a couple of areas like bathrooms where convector-type heating was in place. Mrs. White wished to have alternative forms of heating in place should a gas boiler fail although she never experienced failure of a gas boiler in practice. To Mrs. White's knowledge, the storage heaters which she and her husband had had installed operated normally. She found the house extremely comfortable and it was warm in wintertime. Mrs. White considered that the house had all the comforts of a family home and that it was not deficient in any way.
- 9.13.6 Mrs. White gave evidence regarding work done on the windows of the house in 1990 by Ventrola. She wasn't as happy with the work done as she expected to be: windows were still letting in air. Mrs. White was not aware of any of the windows being deficient structures.
- 9.13.7 Mrs. White gave evidence that she never experienced what looked like rusty water after a tap was turned on. She never experienced that in any of the bathrooms in the house or in the kitchen. No family member or guest had ever brought such an occurrence to her attention.
- 9.13.8 Mrs. White gave evidence that she could not imagine that there would be any particular difficulty in bringing small children into the house though she acknowledged that everybody has their own opinions if they have children.
- 9.13.9 Mrs. White gave evidence that she and her husband had spent a good deal of money on the sunroom. They used it regularly all the time as their main living room. The sunroom was

heated with storage heat and gas fires. That was the room they lived in with constant warmth from the storage heater.

9.13.10 Mrs. White gave evidence that when she and her husband left the house in May 2000 they were happy to have been living there and wanted to continue. She stated that she could have seen herself and her husband living there for years to come. In Mrs. White's view, the house was habitable when they left the house while she accepted that other people were entitled to alter it.

10. It was contended on behalf of the Appellant:

Appellant's Submission in Detail

10.1 Interpretation of the "Treaty"

10.1.1 Article 4(2) provides a tie breaker test which is decisive in a situation where the taxpayer is dual resident and therefore taxable in two Contracting States. It outlines special rules to resolve the conflict which enables a determination to be made for the purposes of the Treaty as to which State a taxpayer is resident in. The Article gives preference to the Contracting State where the individual has a permanent home available to him. The tie breaker rules must be applied serially and on this basis this criterion will frequently be sufficient to solve the conflict, without resort to the 'centre of vital interests' or 'habitual abode' tests subsequently outlined in the Article. These are objective tests of matters of fact and involve no element of intention or subjectivity.

10.1.2 When interpreting Article 4(2) of the Treaty, its terms are primarily to be given a general international meaning. The terminology of the Treaty is "what may be called international tax language"¹. The OECD Treaty is intended to be adopted by a number of States and accordingly similar meaning should be given by each State to particular expressions contained in the Articles. If each State were to apply its domestic law to these expressions divergent meanings could be accorded to them thereby defeating the purpose of the Article

¹ Double Taxation Agreements (4th Ed.) Volume I, Charles Haccius and Pat O'Brien (2001) Page G-3

which is designed as a tie-breaker clause to overcome conflicts between domestic legislation in two different jurisdictions.

- 10.1.3 The commentary to the OECD Model clearly indicates that the expressions are to be given a single international meaning. No solution to the conflict can be arrived at by exclusive reference to the concept of residence or domicile as adopted in the domestic law of a single State. The OECD Commentary is useful when interpreting the provisions of a treaty by giving general insight into the objectives of the drafters of the treaty. Mummery J. in *IRC –v- Commerzbank AG*² stated the following principles in relation to the construction of the language of a tax treaty when he said:

“The language is aimed at a much wider audience than a piece of domestic legislation. It should be interpreted.... unconstrained by technical rules of [domestic] law, or by [domestic] legal precedent, but on broad principles of general acceptance.”

- 10.1.4 In *Crown Forest Industries –v- Canada*³, on an appeal from the Federal Court of Appeal, Iacobucci J stated that:

“in interpreting a treaty, a paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties” (i.e. the drafters of the Treaties).

- 10.1.5 Later in the judgement Iacobucci J states:

“A court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon)”.

² [1990] STC 285,298

³ [1995] S.C.R. 802

10.1.6 This does not, of course, mean that a court would not be assisted by the domestic law as to the meaning of an expression found in the Treaty especially where there has been little commentary or jurisprudence on the question.

10.2 Interpretation of Article 4(2) “Permanent Home Available to Him”

Meaning of the Word “Home”

10.2.1 Article 4(2)(a) deems a person to be a resident of the State where that person has a “permanent home” available to him only in that State. The word “Home” in the context of the Article is not defined in the text of the Treaty.

10.2.2 The Oxford English Dictionary defines home as meaning:

“the place where one lives permanently, especially as a member of a family or household; a fixed place of residence..... as representing the centre of family life”.

10.2.3 The Chambers Twentieth Century Dictionary defines home as meaning:

“the scene of domestic life, with its emotional associations”.

10.2.4 The Random House Dictionary of the English Language defines home as meaning:

*“the place in which one's domestic affections are centred”*⁴

10.2.5 Clearly the meaning of the word home must be more meaningful than merely a “house”, a “building” or a “property”. Before a property could be considered to be a person’s home, the

⁴ Geothermal Energy New Zealand Limited v Commissioner of Inland Revenue [1979] 2 NZLR 324, Page 21

person concerned must have established a pattern of living in it and returning to it over a period of time. Mere ownership of a property does not make it a home. Nobody would accept that a property that they had never lived in could be their home. It is interesting that the word “foyer” is used in the official French translation of the OECD Treaty rather than “maison” or “habitation”. “Foyer” conveys the same concept of the family gathered around the fireside i.e. a living, breathing home. It is submitted that the word “home” is used deliberately in direct contrast to the place that could be referred to as a “house” (“habitation” in the former French internal law).

10.2.6 The maxim: “*ubi uxor ibi domus*” alluded to by Beattie J in the Geothermal Energy case roughly translates as: *a man’s home is where his wife is*.

10.2.7 This meaning is consistent with the meaning of home used in the U.S. Treaties that define permanent home as “the place where an individual dwells with his family”⁵. The Technical Explanation of the Convention specifically states that the Article in question is patterned generally after the fiscal domicile article (Article 4) of the OECD Model Convention.

10.2.8 The French Ministry of Foreign Affairs in interpreting permanent home in the France-Switzerland treaties⁶ made this very point:

“By the use of the word “foyer” emotional and family links are called into play.”

10.2.9 Further support for this interpretation is derived from the Belgian official commentary referring to permanent home:

“The place where the taxpayer habitually lives, with his wife and children, if he has any, is the criterion normally used for nearly all [Belgian] tax conventions. That is

⁵ United States – Belgium Income Tax Convention (1972). United States – Republic of Korea Income Tax Convention (1979), United States – Norway Income and Property Tax Convention (1972)

⁶ 1953 and 1966, Reponse Bourgeois (J.O. deb. A.N. January 26, 1974 p. 488 No 6010), translation from the International Tax Treaties Service, Ed. M. Edwardes - Ker.

the place he returns to after each of his absences on business and where he may have his household."

10.2.10 The concept of "home" has been considered in numerous Common Law cases.

10.2.11 In a UK Chancery Division tax case, *Frost v Feltham*⁷ Nourse J. referred to a property as being "not merely a residence but a home". He also referred to the property as being "fully furnished and equipped as a home". The case concerned a taxpayer who was the tenant and licensee of a public house in Essex. He purchased a house in Wales with his wife in their joint names. The Inland Revenue refused his claim for income tax relief in respect of mortgage interest as they claimed that the house was not used by him as his "only or main residence". The Court decided that the house in Wales was not his only residence but was his main residence and mortgage interest income tax relief was allowed. The comments of Nourse J are a judicial recognition that there is a distinction between the concept of a residence and a home. The word "home" implies something more than a house or a residence and that additional personal element is what makes it a home.

10.2.12 In that context, it may be of some assistance to note that the word "home" has a position in the Irish Constitution which recognises the special place of women in the home in Article 41, and also includes the restraint on domiciliary arrest in Article 40, Section 5, although the terminology in this latter Article refers to dwelling rather than home. The Irish Constitutional recognition of the special status of a "home", it is submitted, supports the view that it is correct in Irish law to adopt an approach similar to, if not stronger than, that adopted in the United Kingdom. Such an approach requires the additional personal element to be present in order that a premises may be properly described as a home rather than a mere residence or house.

10.2.13 In another UK case, *In re Estlin*,⁸ Kekewich J described a "home" as something very different from a hotel or lodgings for which you pay. It is a place where you find not only the reasonable comforts of life according to your position in life, but where you find the comforts of what is known as a home.

⁷ [1981] WLR 452

⁸ *Re Estlin*, referred to in *Words and Phrases Legally Defined* (3rd Ed.) John B. Sanders, Barrister

10.2.14 In the New Zealand Case (referred to earlier), *Geothermal Energy New Zealand V Commissioner of Inland Revenue*⁹ the Supreme Court of Auckland considered the meaning of the term “home” in the context of the question whether PAYE is required to be deducted from the salary of a New Zealand national who worked abroad for a period in excess of 15 months. After detailed consideration, Beattie J decided that home meant

“where the heart is; it is the location of the axis around which, for the present, the normal course of one’s life revolves. Put another way, it is the place where the centre of gravity of one’s domestic life is to be found.”

10.2.15 He accepted the submission that for a married person, home will generally be where his spouse and children are to be found. He also stated that: *“in very broad terms I consider that once a person lets his former dwelling place and moves away from it with his family it is not his home any more – at least until he and his family move back into it”.*

10.2.16 In concluding his judgement Beattie J made the following declarations:

- (a) *The essence of the ‘home’ criterion is the centre of gravity for the time being of the life of the person concerned. It will usually be where his wife and children reside. If he has no such family, or is separated, divorced or single, then the place where the normal course of his life occurs will apply – that is, the centre of his interests and affairs”; [Emphasis added]*
- (b) *Though ‘home’ needs some degree of permanency, it does not connote ‘permanent home’ in the sense making it similar to the concept of ‘domicile’. The distinction should also be drawn between the place that has become the centre of gravity and that which is merely used for such ephemeral or transient purpose;*

⁹ Supra, Footnote 4

(c) 'Home' should not be regarded as synonymous with the ownership of any interest in a house or property. It should in my opinion be construed qualitatively."

10.2.17 Counsel submitted that "home" is not just a function of title or ownership. Your home might be a place that might be a room rented for many years at a modest rate and a very large house occupied for a limited period might never become your home.

10.2.18 Guidance on the meaning of the word "home" is also to be found in the context of the European Convention on Human Rights. Article 8 of the Convention provides that

10.2.19 *"Everyone has the right to respect for his private and family life, his home and his correspondence".*

10.2.20 In *Loizidou V Turkey*¹⁰ the European Court of Human Rights observed that:

"it would strain the meaning of the notion "home" in Article 8 to extend it to comprise property on which it was planned to build a house for residential purposes".

10.2.21 The applicant in the case had planned to live in one of the flats whose construction had begun at the time of the Turkish occupation of northern Cyprus in 1974. As a result, it had been impossible to complete the work and subsequent events had prevented her from returning to live in what she considered as her home town.

10.2.22 In *Harrow LBC V Qazi*¹¹ the Court of Appeal held, when interpreting Article 8(2) of the European Convention of Human Rights that "home" has a wider meaning for the purposes of the article than the lawful occupation of a property and should not be construed with reference

¹⁰ (40/1993/435/514, Strasbourg, 18 December 1996)

¹¹ Halsburys Monthly Review June 2002 p.50

to domestic law concepts of landlord and tenant, licence or trespass. A property to which a tenant had lost entitlement continued to be his home for the purposes of the article provided he had occupied it immediately prior to losing his entitlement.

10.2.23 These decisions illustrate the principle that prior to any property being regarded as a home it must firstly have been occupied by the person in question.

10.2.24 The commentary to the OECD Model Estate and Inheritance Tax Convention¹² which has a similar tie breaker test states that intention to return to or abandon a home is not applicable to the tie breaker test.

10.2.25 In the Irish context, the Revenue themselves have provided guidance on their interpretation of the accepted meaning of the word "home" in the context of CGT principal private residence relief legislation¹³. The Revenue are of the view that

"The word "residence" has its normal meaning and for an individual this is a dwelling in which he habitually lives. In other words it is his home."

10.2.26 In the context of home loan interest relief, the Revenue have stated¹⁴ that:

"In general the sole or main residence of any person will be the residence which is the person's home for the greater part of the time and where friends and correspondents would expect to find him/her."

10.2.27 In the context of rent a room relief, the Revenue stated¹⁵

¹² Paragraph 22

¹³ Paragraph 19.7.3.2 Revenue CGT Manual

¹⁴ Tax Briefing 34

¹⁵ Tax Briefing 44

“In general, a property will be an individual’s sole or main residence if it is the individual’s home and it is the place where friends and correspondents would expect to find him/her.”

10.2.28 In the Family Home Protection Act 1976 a “family home” is defined as

“primarily, a dwelling in which a married couple ordinarily reside...”

10.2.29 The Supreme Court was asked to consider whether an intention to reside in a property made it a family home. In *National Irish Bank –v- Graham*¹⁶ the Supreme Court considered whether spouses must have been resident in a dwelling before it can constitute a family home in the context of the Family Home Protection Act 1976. Finlay C.J. (Egan and Blayney J.J. concurring) was not prepared to extend the meaning of family home within Section 2(1) of that Act to encompass the situation where a couple intended to reside in the property. He was also not prepared to accept that the words “ordinarily reside” include a situation in which a married couple did not actually occupy the dwelling but intended or were about to live in it.

10.2.30 The Supreme Court held that a dwelling does not become a “family home” until such a time as a married couple physically occupy it and ordinarily reside there. A property that a married couple have never actually resided in cannot be a “family home” and a property by definition can only become a family home subsequent to the couple residing in it.

10.2.31 The word “home” as used in the Treaty means more than merely a house or a residence. It is the place where the person habitually lives, the place the person generally returns to at the end of a day, where the comforts of what is known as a home are contained. If the taxpayer is a married man with children, as is the case in point, his home is where his wife and family live.

Counsel submitted that in order for a residential premises to be a home it has to, at least, have been lived in on some occasion by the person whose home it is.

¹⁶ (no.2) [1995] 2IR 244

10.3 “Permanent” Home

10.3.1 For the Revenue’s case to be sustained the Treaty requires the availability of a “permanent home” and not merely a home.

10.3.2 Paragraph 13 of the OECD Model Tax Convention commentary states that:

“As regards the concept of home...any form of home may be taken into account...but the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of a short duration (travel for pleasure, business travel, education travel, attending a course or a school, etc)”.

10.3.3 The Oxford English Dictionary defines the adjective “permanent” as:

“continuing or designed to continue indefinitely without change; abiding, lasting, enduring, persistent”

10.3.4 The Commentary to the OECD Model states¹⁷ that the home must be permanent i.e.

“the individual must have arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at school, etc.). A permanent home is contrasted with “a stay of some length”. [Emphasis added].

10.3.5 A similar statement is contained in a ruling of the Swiss Federal Tax Administration¹⁸ in relation to the Switzerland/Germany Treaty (1971) in which a permanent home is described

¹⁷ Commentary on Article 4, II Commentary on the provisions of the article, paragraph 2

as being any form of home that is at a person's disposal for an extended period of time in which he is actually living regularly and not staying only occasionally for the purposes of recreation, health treatment, study, sport etc.

- 10.3.6 It is submitted that “permanent” in the context of the Treaty is used objectively and not subjectively in the sense of a place where the taxpayer intends to spend the rest of his life. Du Parcq LJ in *Henriksen –v- Grafton Hotel Limited*¹⁹ stated that “permanent” is indeed a relative term and is not synonymous with “everlasting”. This view was reaffirmed by Dixon J in *Kraft –v- McAnulty*²⁰ where he stated that “permanent” does not mean perpetual or eternal.
- 10.3.7 Prof. Dr. Klaus Vogel in his acclaimed dissertation on tax treaty interpretation concurs with the view that the definition of “permanent home” centres around the concept of permanent use. A home is permanent only if the individual intended it, and kept it available, for his permanent use. The element of time does not relate to the owning or possessing but rather to the using of the home as such.
- 10.3.8 The Inland Revenue²¹ has stated that in their view a permanent home is one which is continuously available for personal use. It does not necessarily have to be owned but a property which is let out will not be a permanent home because the fact that it is let to someone else means that it is not continuously available for one's own use.

It is quite clear that the adjective permanent is used specifically to qualify “home” to ensure that the “home” is available and used for continuous periods of time as opposed to periods of short duration.

10.4 Application To Facts Of This Case:

77 Wellington Road

- 10.4.1 The Revenue have accepted that 77 Wellington Road was not available to the Appellant for 2000/2001. It is submitted that a six week period between lettings is not sufficient time to constitute continuous availability for use, and, therefore, cannot constitute a permanent home.

¹⁸ 16 February 1977

¹⁹ Cited in Words and Phrases Legally Defined (3rd Ed.) John B. Sanders, Barrister

²⁰ Cited in Words and Phrases Legally Defined (3rd Ed.) John B. Sanders, Barrister

²¹ Helpsheet IR302 entitled “Dual Residence”

10.4.2 This is why the Treaty qualifies “home” by the adjective “permanent”. The six week gap was necessitated by the need to repair a water leakage in the property, to repaint the interior of the property, to arrange for it to be cleaned and to obtain suitable new tenants for its subsequent letting. In the six week period the letting agent contacted a relocation services company to locate suitable new tenants. The property was shown to the new tenants, the terms of the lease were negotiated and the appropriate documentation drafted.

6 Raglan Road

10.4.3 For the years under appeal this property does not qualify as the Appellant’s home. There was never a pattern of living in this property by the Appellant or his family. During the relevant period neither the Appellant or his wife ever lived in the property. The property was purchased by a property development company for development purposes. It was never a home of the Appellant prior to its acquisition by Partenay Limited or during the development period. The property during the years in question could not be considered to be a “foyer d’habitation”, where the individual lives with his family, where a taxpayer habitually lives, fully furnished and equipped as a home, containing the additional personal elements that make it a home, a place where you find the reasonable comforts of life according to a person’s position in life, a place where may be found the comforts of a home, or the location of the axis around which the normal course of a person’s life revolves. One could not say that during the years in question 6 Raglan Road was the centre of gravity of where the Appellant’s domestic life was to be found, or in the Revenue’s own words “a dwelling in which he habitually lives”.

10.4.4 Not alone does the property fail to come within the accepted definition of a “home” in the context of the Treaty, it was, in fact, a construction site throughout the relevant periods. When it was purchased by Partenay Limited the vendors had stripped the house of an upstairs fireplace, the Aga cooker and the Small Bone kitchen fittings in the kitchen.

10.4.5 The builders, architects, quantity surveyors and engineers entered the property during May 2000 for feasibility work which necessitated severing the water supply, plumbing, heating, together with removal of floors and the electrical wiring. Subsequent to the grant of planning permission the builders returned and substantially remodelled the entire inside of the house. This extensive construction work was performed continuously until January 2002.

10.5 Meaning of “Available”

10.5.1 It is important to remember that the tie breaker requires the taxpayer not only to have a “home” that is a “permanent home” but also that the “permanent home” is “available to him”. The commentary to the OECD Model refers to the home being “available to him at all times continuously”.²²

10.5.2 The Oxford English Dictionary defines “available” as

“of advantage to” or

“able to be used or turned to account; at one’s disposal; within one’s reach, obtainable;”

10.5.3 The Webster’s New Twentieth Century Dictionary defined ‘available’ as:

*“capable of being used; that can be got, had or reached; handy; accessible”*²³.

10.5.4 A review of the leading cases and commentaries indicates that two broad principles apply in determining whether a property may be said to be “available”.

10.5.4.1 *Suitability*

An accepted view of leading authors on International tax treaties is that “available” in the context of the OECD model means applying the test of whether the taxpayer could live in the house i.e. whether the property is suitable for the taxpayer as a permanent home. For example, a house which is not equipped for use in the winter might be excluded from being a permanent home on this ground. In *Endres –v- The Queen*²⁴ the Tax Court of

²² Commentary to Article 14, Paragraph 13

²³ Cited in Case J41, Taxation Review Authority, 13 February 1987

²⁴ 1 October 1997

Canada refused to consider a property that was only inhabited during the summer months and not suitable as a home during the Winter months as a permanent home available.

- 10.5.4.2 In an Irish High Court case²⁵ Barrington J. considered the suitability concept in the context of family home legislation. He was of the view that a house that was in need of substantial repair and renovation was not

“a fit or suitable place for [the plaintiff] or anyone else to live in.”

- 10.5.4.3 This reinforces our conclusion that a house that is not suitable as a residence cannot be “permanent home”.

Ability to Occupy at Short Notice

- 10.5.4.4 It is accepted that there may be circumstances where a mere short term, or temporary, exclusion of the ability to occupy may be insufficient to render the property not available to the taxpayer. See, for example, *Wolf –v- Queen*²⁶ and the New Zealand tax case J 41²⁷.
- 10.5.4.5 Applying these principles to the properties, the subject matter of this appeal, the Appellant submits as follows:-

77 Wellington Road

- 10.5.4.6 The Revenue have accepted that 77 Wellington Road was not available to the Appellant in the tax year 2000/2001.

²⁵ LB v HB [1980] ILRM 257, 260

²⁶ Decision delivered 31 August 2000 and revised 23 October 2000

²⁷ Case J41, Taxation Review Authority, 13 February 1987

6 Raglan Road

- 10.5.4.7 In both tax years, 6 Raglan Road was not “available” to the Appellant.
- 10.5.4.8 The property was not suitable for use as a home for the Appellant and his family because:-
- 10.5.4.8.1 When the property was purchased by Partenay Limited the Vendors removed significant amounts of fixtures, including the Aga cooker, the kitchen units, appliances, lights and kitchen doors.
- 10.5.4.8.2 The house suffered from damp and was therefore not suitable for habitation by the Appellant.
- 10.5.4.8.3 The pre-planning investigation work carried out from May 2000 left the house with no heating, no plumbing, with holes in the floors, the roof and generally in an unsafe condition as it was a construction site.
- 10.5.4.8.4 When the main building contractors commenced in January 2001 (subsequent to the grant of planning permission), the house was gutted entirely and remained a construction site until the end of January 2002.
- 10.5.4.9. The Appellant was not able to occupy the property during the years under appeal because
- 10.5.4.10 The property was owned by Partenay Limited, a legal entity, which had its own Board of Directors.
- 10.5.4.11 Once the contractors (Pierse Contractors) commenced on site, Partenay Limited, its Directors or the Appellant had no rights over entry onto the site. As is standard in building contracts, possession of the site passed from Partenay Limited to Pierse once Pierse went on site. Possession was handed over on 8 January 2001 and was not handed

back until 21 December 2001. At this date the property still remained uninhabitable as a lengthy and substantial snag list was still outstanding.

- 10.5.5 For these reasons it is submitted by the Appellant that as a matter of fact during the period in question 6 Raglan Road was not “available” for use as a permanent home by the Appellant.

11. **It was contended on behalf of the inspector of taxes:**

- 11.1 The requirement in Article 4.2(a) of the Double Taxation Convention is that “*a permanent home (be) available to him*”. There is no requirement that the permanent home be availed of; it is simply the case that the permanent home must be available to the individual. Therefore, in determining whether there was “a permanent home available” to the appellant, it is incorrect to interpret the words “permanent”, “home” and “available” in isolation and similarly incorrect to adopt a literal interpretation of the term “permanent home available”. The appropriate methodology is to take into account the context in which the term “permanent home available” is used in the Convention and the surrounding provisions.
- 11.2 The appropriate context in which the question as to whether there was a “permanent home available” to the appellant should be decided, is the context of Article 4.2 of the Convention taken as a whole. The case of *McGimpsey v Ireland* (1988) IR 567 is authority for the proposition that, by reference to Article 31 of the Vienna Convention, the ordinary meaning of words must be addressed in their context and in the light of the object and purpose of the Double Taxation Conventions. Taking Article 4.2 of the Convention in its entirety, the commentary on the Convention indicated, in paragraphs 9 and 10, that the purpose is to find the place where it would be most natural to tax the individual. Therefore, the “permanent home available” question is part of a broader issue as to where the individual should most naturally be taxed.
- 11.3 It is necessary to refer not only to sub-paragraph (a) of Article 4.2 of the Convention but also to sub-paragraphs (b), (c) and (d) of Article 4.2 as these sub-paragraphs also form part of the overall context. In the overall context, it is clear that Article 4 recognises a situation where an individual could have two homes or even two “habitual abodes”. Therefore, any tendency to interpret the phrase “permanent home available” in a way, which linked it solely to a concept

of a permanent home or domestic home or domicile was clearly contrary to the provisions of Article 4.2 of the Convention.

11.4 The case of *IRC –v- Commerz Bank AG* (1990) STC 285 concerning the Double Taxation Convention between the United Kingdom and the United States indicated (Mummery J at p297) that it is necessary to look first for a clear meaning of the words used in the relevant article in the Convention bearing in mind that consideration of the purpose of an enactment was always a legitimate part of the process of interpretation and that the strict literal approach to interpretation was not appropriate in construing legislation which gives effect to an international Treaty. Therefore, care has to be taken not to define “permanent”, “home” and “available” individually and then attempt to fit the three concepts together. This proposition that you apply the ordinary meaning of words to an interpretation of the Convention was also borne out by the judgement in *Memec Life v IRC* (1998) STC 754. On the basis of the foregoing proposition, Article 4.2(a) should be construed as a whole bearing in mind the following: -

- 11.4.1 Firstly, it is clear from the wording of Article 4.2 that an individual could have two or more permanent homes available;
- 11.4.2 The word used in Article 4.2 is “available” and not “availed of”. Therefore, the concept is that of a “home” that is available for use and not a home that is used, that is, the test is availability and not actual occupation or use;
- 11.4.3 In particular, taking account of the words “permanent” and “available”, the concept of “permanent home available” is different to the concept of “habitual abode” which seems closer to a test of domicile.
- 11.4.4 As there is no definition of “permanent home” in the Convention, in the OECD Model Tax Convention, in the Tax Acts or the Capital Gains Tax Acts, the accepted canons of construction of international treaties and conventions as set out in Articles 31 and 32 of the Vienna Convention and the commentaries to the OECD Model Convention must be applied in order to determine the issue.

- 11.5 In looking at dictionary definitions of “home”, care must be taken not to interpret the word “home” in a way which is inconsistent with the text of the Convention which accepts that an individual can have more than one home at the same time.
- 11.6 Similarly, Article 4.2 of the Convention envisages only the *availability* of the permanent home in question and not that it actually be the centre or location of a family. Equally there is no requirement that the permanent home be available as a possible centre for a family. In this regard, it is possible that an individual could have a home, which was the family home where the individual’s spouse and children resided, and another home used by that individual when not with his/her spouse and children – both can be permanent homes within the meaning of Article 4.2 of the Convention.
- 11.7 The question as to whether a particular dwelling house is or is not available is an objective test with a subjective element of intention to possibly use it as a home. The issue for the purposes of the Convention is whether the home is available to the individual. . The Convention uses the term “home” and not “family home” and, therefore, the test of “centre of vital interests” falls to be addressed where there are two permanent homes available.
- 11.8 A dwelling-house acquired by an individual is, from the date of purchase, a home and a home available to that individual, within the meaning of the Convention, for the period prior to the actual commencement of occupation, even if during that period it was in the process of being renovated, fitted-out and furnished to the individual’s specifications. A house was “available” once it was in a condition, at the time of purchase, to be lived in as a home. When considering the term “permanent”, the concept of a stay is not vital or necessary because the meaning of the word “available” also had to be taken into account. Therefore, actual use is not necessary in identifying a “permanent home available”.
- 11.9 The word “available” does not mean, “used” and neither does it mean “suitable”.
- 11.10 Overall, the requirement of Article 4.2 of the Convention is that a meaning must be found for the phrase “permanent home available” and not just meanings for the individual three words. In looking at the overall context, the word “home” must not be looked at without looking at the word “available” and the expression “permanent home available” should not be considered without bearing in mind that one can have two such permanent homes available at the one time, and, also, without bearing in mind that there is a contradistinction in Article 4.2 between the concepts “permanent home available” and “habitual abode”.

- 11.11 Bearing in mind the foregoing, it was a fact that Mr and Mrs White, the vendors of 6 Raglan Road, had occupied the house as their family home up until 10 May 2000. From that date, the house was at the appellant's command to occupy as the Whites had done.
- 11.12 The fact that the appellant and his wife moved into the house and began to use it as a family home at a time prior to the completion of the snag list by the builders was indicative of their perception of the house, from the time of purchase, as a possible family home. This was further borne out by the detailed, specific requirements set out by them for the refurbishing, fitting-out and decorating of the house and in landscaping the grounds.
- 11.13 As regards "permanent home available", the appropriate test to be applied in these circumstances is the condition of 6 Raglan Road in May 2000, not what the condition of the house was in January 2001, when the builders moved in and it became their site.

12. The following cases were cited in the course of the hearing:

- 12.1 *MacEachern -v- Carr (Inspector of Taxes) [1996] STC 282*
- 12.2 *Mahony -v- Waterford, Limerick and Western Railway Company [1900] 2 IR 273*
- 12.3 *Saatchi and Saatchi Advertising Limited -v- McGarry 5 ITR 376; [1998] 2 IR 562*
- 12.4 *O'Connell -v- Fyffe's Banana Processing Limited [2000] ITR 235*
- 12.5 *Hurley -v- Taylor (Inspector of Taxes) [1999] STC 1*
- 12.6 *Frost -v- Feltham [1981] WLR 452*
- 12.7 *Re. Estlin, Pritchard -v- Thomas (1903) 72 L.J. Ch. 687.*
- 12.8 *Geothermal Energy New Zealand -v- CIR [1979] 3 TRNZ 324*
- 12.9 *Loizidou -v- Turkey 15318/99; [1998] ECHR 60 (28 July 1998)*
- 12.10 *Harrow London Borough Council -v- Qazi [2003] UKHL 12.11*
- 12.11 *McGimpsey -v- Ireland [1988] IR 567*
- 12.12 *Endres -v- The Queen, Tax Court of Canada, 1 October, 1997*
- 12.13 *Wolf -v- The Queen, Tax Court of Canada, 23rd January 2001*
- 12.14 *Inland Revenue Commissioners -v- Commerz Bank AG [1990] STC 285*
- 12.15 *Fothergill -v- Monarch Airlines Limited [1981] AC 251*
- 12.16 *Memec Plc -v- Inland Revenue Commissioners [1998] STC 754*
- 12.17 *National Irish Bank -v- Graham [1995] 2 I.R. 244*

13. Having heard the arguments and the evidence advanced by both parties and having read the documents referred to in the appendices thereto, I reserved my determination of the appeal. In reaching my determination, I was satisfied that Barrington J. in *McGimpsey v Ireland* (1988) IR 567 sets out the manner in which general principles of interpretation of international law, and in particular the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties should be approached. Article 31 takes a purposive approach to the interpretation of legislation which is different to the approach generally followed in the interpretation of taxing statutes. It is this purposive approach that I have applied in relation to this hearing. The test applied by me was also on the balance of probabilities. In an oral decision communicated to the parties on 26 September 2003, I agreed with and adopted the arguments advanced by the appellant holding as follows: -

13.1 The property at 6 Raglan Road, Ballsbridge, Dublin 4 was acquired in the name of Partenay Limited, a company controlled by the Appellant, under a contract of 10 February 2000, which was closed on 10 May 2000. The kitchen units, including the Aga, did not form part of the sale. These items had been removed from the premises by the closing date. I was satisfied that the property was acquired by the Appellant for investment purposes and with the idea that it might be used as a family home in the future. The Appellant and his wife gave evidence of their acquisition of other properties for investment. I was satisfied that there were such acquisitions during the years preceding this particular acquisition.

13.2 The notion of “home” in the context of the “permanent home available” test is a residential premises upon which people have put their own stamp and where they have lived for some time and where they had their “stuff”.

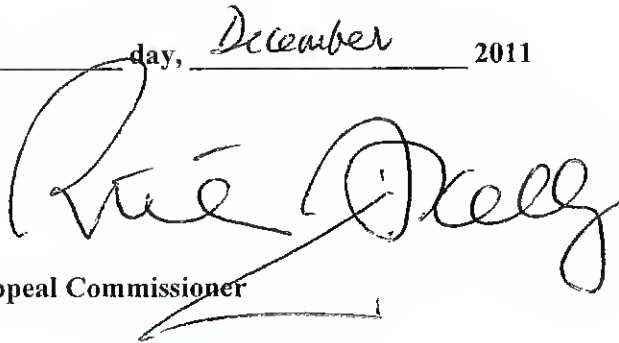
13.3 It was clear from the evidence of the appellant and his wife that neither the appellant nor his family resided in the premises at any time prior to the end of the tax year 2000/2001; additionally, I was satisfied that the appellant did not make his mark or put his stamp on the premises during the period in question.

- 13.4 The property having been acquired in May 2000 had been subject to increasingly invasive opening-up works from June to September 2000; it remained in the opened-up state from then until the contract work commenced in January 2001; contract works were in progress throughout the calendar year 2001. I therefore concluded that the premises at 6 Raglan Road was not a home of the appellant either before or during the tax year 2000/2001. The appellant cannot, therefore, be said to have had a permanent home available to him in that period at 6 Raglan Road.
- 13.5 As regards the matter of availability in the context of the phrase “permanent home available”, as the property was acquired in May 2000 at which time it did not have any kitchen units or equipment; as opening-up works commenced in June 2000 and were completed in September 2000, as significant works were also identified as necessary to the fabric and to the services in the building and, as the building remained in its opened-up state from then until the contract works commenced in January 2001 and remained thus throughout the rest of the tax year 2000/2001, I was satisfied that the house could not reasonably be regarded as “available” in the sense of a “permanent home available” to the appellant during the tax year 2000/2001.
- 13.6 In reaching this conclusion, I considered that the condition of the premises throughout the period from acquisition, with the possible exception of the period of acquisition to the commencement of opening-up, rendered it unavailable as a home to the appellant. In this regard, I relied on the evidence of Mr. Burke, Mr. Rooney, Mr. Meagher and Mr. Lawrence. The fact that the works were carried out at the request and choice of the appellant did not alter the situation. The property was not a permanent home available.
- 13.7 In summary, 6 Raglan Road was not a permanent home available to the appellant for the tax year 2000/2001, the premises being neither a home nor available during that period. I found that, as a consequence, there is no need for the Tribunal to consider the matter of centre of vital interests as the appeal is determined by reference to the earlier tie-breaker test.
14. Immediately following upon my determination as aforesaid, dissatisfaction was expressed therewith on behalf of the respondent and by notice given by letter dated 1 October 2003 on behalf of the respondent pursuant to section 941 Taxes Consolidation Act, 1997, I have been requested to state and sign this Case Stated for the opinion of the High Court.

15. The question of law for the determination of the High Court is:

Whether, having regard to the evidence given and the facts found by me as aforesaid, I was correct in holding that 6 Raglan Road, Ballsbridge, Dublin 4 was not a permanent home available to the appellant for the tax year 2000/2001 for the purposes of Article 4.2 of the Ireland/Portugal Double Taxation Convention.

Dated this 16th day, December 2011

A handwritten signature in black ink, appearing to read 'Ronan Kelly', written over a horizontal line.

Signed: Ronan Kelly, Appeal Commissioner